

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	No. CR-F-98-5022 OWW
)	
)	MEMORANDUM DECISION AND
)	ORDER DENYING PETITIONER
Plaintiff/)	WILSON THOMAS'S MOTION FOR
Respondent,)	REDUCTION OF SENTENCE
)	PURSUANT TO 18 U.S.C. §
vs.)	3582(c)(2)
)	
WILSON THOMAS,)	
)	
)	
Defendant/)	
Petitioner.)	
)	
)	

On November 16, 2009, Petitioner Wilson Thomas, proceeding *in pro per*, filed a second motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2).¹ Petitioner contends that he is entitled to a reduction in his sentence pursuant to Amendment 706 to the United States Sentencing Guidelines.

¹On March 24, 2008, Petitioner filed a motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) based on the United States Sentencing Commission's reduction in the base offense level for offenses involving crack cocaine. Petitioner withdrew this motion on August 21, 2008.

1 Petitioner pleaded guilty to conspiracy to distribute and to
2 possess with the intent to distribute cocaine and cocaine base
3 (Count One) and to carrying a firearm in relation to a drug
4 trafficking offense (Count Seven). Petitioner was sentenced to a
5 term of 120 months imprisonment on Count One and a mandatory
6 consecutive sentence of 60 months imprisonment on Count Seven.

7 "As a general matter, courts may not alter a term of
8 imprisonment once it has been imposed." *United States v. Hicks*,,
9 472 F.3d 1167, 1169 (9th Cir.2007). However, 18 U.S.C. §
10 3582(c)(2) creates an exception to this rule by allowing
11 modification of a term of imprisonment if: (1) the sentence is
12 "based on a sentencing range that has been subsequently lowered
13 by the Sentencing Commission" and (2) "such a reduction is
14 consistent with applicable policy statements issued by the
15 Sentencing Commission." The Sentencing Commission promulgated
16 Amendment 706 to the Sentencing Guidelines in response to the
17 100-to-1 disparity in sentencing between offenses involving
18 powder cocaine and crack cocaine. See *Kimbrough v. United*
19 *States*, 552 U.S. 85 (2007). Amendment 706, which became
20 effective on November 1, 2007 and was made retroactive by
21 Amendment 713, reduces this disparity by adjusting downward by
22 two points the base offense levels assigned to various quantities
23 of crack cocaine in the Drug Quantity Table in U.S.S.G. § 2D1.1.
24 According to the relevant U.S.S.G. policy statement, "a reduction
25 ... is not authorized under 18 U.S.C. § 3582(c)(2) [if the]
26 amendment ... is applicable to the defendant but the amendment

1 does not have the effect of lowering the defendant's applicable
2 guideline range because of the operation of ... a statutory
3 mandatory minimum term of imprisonment[]." U.S.S.G. § 1B1.10,
4 cmt. n.1(A) .

5 Petitioner was sentenced to the mandatory minimum sentence
6 of ten years on Count One pursuant to 21 U.S.C. § 841(a)(1)(A) .
7 As ruled in *United States v. Paulk*, 569 F.3d 1094, 1095 (9th
8 Cir.2009) :

9 Paulk is not entitled to a reduction because
10 his sentence was not 'based on a sentencing
11 range that has subsequently been lowered by
12 the Sentencing Commission,' 18 U.S.C. §
13 3582(c)(2), but rather was based on the
14 statutory mandatory minimum under 21 U.S.C. §
15 841. This mandatory minimum 'was not
16 affected by the change in the [drug]
17 equivalency tables.'

18 Because Petitioner's sentence on Count One was not based on a
19 sentencing range that was subsequently lowered by the Sentencing
20 Commission, Petitioner is not entitled to reduction of his
21 sentence pursuant to Section 3582(c)(2) .

22 Petitioner's contention that the Court has discretion to
23 reduce his sentence pursuant *Kimbrough*, *supra*, and *United States*
24 *v. Knox*, 573 F.3d 441 (7th Cir.2009), is without merit.
25 *Kimbrough* and *Knox* involved direct review of a criminal sentence
26 that was not yet final, not a motion for reduction of sentence
pursuant to Section 3582(c)(2) after a sentence had become final.
See United States v. Tabb, 2009 WL 3352321 (S.D.Ill., Oct. 16,
2009) .

Petitioner asserts that, "[b]ecause § 846 is not included in

1 the § 994(h) mandate, § 994(h) does not limit a district court's
2 discretion under Kimbrough to consider the crack/powder disparity
3 affecting a career offender convicted under § 846, like the
4 defendant."

5 28 U.S.C. § 994(h) mandates that the Sentencing Commission
6 assure that certain "career" offenders, as defined in the
7 statute, receive a sentence of imprisonment "at or near the
8 maximum term authorized." U.S.S.G. § 4B1.1 implements this
9 mandate.

10 Petitioner's contention is without merit. Petitioner was
11 not sentenced as a "career offender" as that term is defined in
12 Section 994(h) (1). Further, as ruled above, the Court does not
13 have discretion to reduce Petitioner's sentence under Section
14 3582(c) (2) because he was sentenced to the statutory mandatory
15 minimum enhanced by a statutorily mandated consecutive 60 month
16 term for use of the firearm.

17 For the reasons stated, Petitioner Wilson Thomas's motion
18 for reduction of sentence pursuant to 18 U.S.C. § 3582(c) (2) is
19 DENIED.

20 IT IS SO ORDERED.

21 Dated: December 3, 2009

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE